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EXAMINER

FERGUSON, MICHAEL P

| ART UNIT | PAPER NUMBER |
|----------|--------------|
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3679

DATE MAILED: 03/01/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/624,263

Applicant(s)

YORK ET AL.

Examiner

Michael P. Ferguson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 November 2004.
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11 and 13-33 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1-5, 7-11 and 13-33 is/are rejected.
7) ☐ Claim(s) 6 is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☒ The drawing(s) filed on 22 July 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Applicant should note that a different examiner has examined the application. Accordingly, claims may have been interpreted differently.

Claim Objections

1. Claims 6, 17 and 29 are objected to because of the following informalities:

Claim 6 (line 1) recites "a tube having a vertical slit and a hole, and said tube is". It should recite --tubes each having a vertical slit and a hole, and one of said tubes is--.

Claim 6 (line 3) recites "and is position between". It should recite --and one of said tubes is positioned between--.

Claim 17 (line 12) recites "a bottom rail". It should recite --a bottom rail of said frame--.

Claim 17 (line 13) recites "said first vertical rail and said second vertical rail". It should recite a first vertical rail and a second vertical rail of said frame--.

Claim 17 (line 15) recites "a first vertical rail". It should recite --said first vertical rail--.

Claim 29 (line 2) recites "having opening". It should recite --having openings--.

For the purpose of examining the application, it is assumed that appropriate correction has been made.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 15 and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Lauzier (US 3,955,799).

As to claim 15, Lauzier discloses a rail barricade comprising:

a frame including a first vertical rail (not shown), a second vertical rail (not shown), and a top rail 1 having a plurality of top holes 5;

a bottom rail 2 including a plurality of bottom holes 5, a first end secured to the first vertical rail and a second end secured to the second vertical rail; and

a plurality of vertical spokes 3 each having a substantially circular cross-section and including a top end shaped to fit in one of the top holes and a bottom end shaped to fit in one of the bottom holes, and one of the top end and the bottom end includes a flat surface 6 that engages a corresponding flat portion in one of the plurality of top holes and one of the plurality of bottom holes to prevent rotation of each of the plurality of vertical spokes (Figure 1).

As to claim 16, Lazier discloses a rail barricade wherein each of the plurality of bottom holes 5 of the bottom rail 2 includes the flat portion and the bottom end of each of the vertical spokes 3 includes flat surfaces 6 (Figure 1).

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 15, 16, 29 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Doublet (US 4,646,807) in view of Lauzier.

As to claim 15 and 16, Doublet discloses a rail barricade comprising:

a frame including a first vertical rail 4, a second vertical rail 3, and a top rail 5 having a plurality of top holes (inherently);

a bottom rail 6 including a plurality of bottom holes (inherently), and a first end secured to the first vertical rail and a second end secured to the second vertical rail; and

a plurality of vertical spokes 7 each having a substantially circular cross-section and including a top end shaped to fit in one of the top holes and a bottom end shaped to fit in one of the bottom holes (Figure 1).

Doublet fails to disclose a rail barricade wherein one of the top end and the bottom end includes a flat surface that engages a corresponding flat portion in one of the plurality of top holes and one of the plurality of bottom holes to prevent rotation of each of the plurality of vertical spokes.

Lauzier teaches a rail barricade comprising a plurality of vertical spokes 3 each having a substantially circular cross-section and including a top end shaped to fit in a top hole 5 of a top rail 1 and a bottom end shaped to fit in a bottom hole 5 of a bottom rail 2, and one of the top end and the bottom end includes a flat surface 6 that engages a corresponding flat portion in one of the plurality of top holes and one of the plurality of bottom holes to prevent rotation of each of the plurality of vertical spokes;

wherein each of the plurality of bottom holes of the bottom rail includes the flat portion and the bottom end of each of the vertical spokes includes flat surfaces; the flat surface of each vertical spoke providing for a secure, non-rotable hold of the spoke within a corresponding rail (column 2 lines 61-65, Figure 1). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a rail barricade as disclosed by Doublet to have vertical spokes each having a flat surface as taught by Lauzier in order to provide for a secure, non-rotatable hold of the spoke within a corresponding rail.

As to claim 29, Doublet discloses a rail barricade including hooks **15,16** having openings that are each located on a common side (left side) of the rail barricade, and the two hooks are attached to the first vertical rail **4** (Figure 2).

As to claim 30, Doublet discloses a rail barricade including a second rail barricade that is received in the opening of each of the two hooks **15,16**, and the second rail barricade is pivotable about a longitudinal axis of a vertical rail of the second rail barricade to be attached to and removed from the rail barricade (Figure 3b).

6. Claims 1-5, 7-11, 13, 14, 17-24, 26-28, 32 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Doublet in view of Bilby et al. (US 6,199,833).

As to claims 1, 3, 4 and 7, Doublet discloses a rail barricade comprising:
a frame including a first vertical rail **4**, a second vertical rail **3**, and a top rail **5**;
a bottom rail **6** including a first end that is secured to the first vertical rail and a second end that is secured to the second vertical rail;
a plurality of vertical spokes **7** each secured to the top rail and the bottom rail;

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a first foot **8** attached to the rail barricade;

a second foot **9** attached to the rail barricade; and

two hooks **15,16** attached to the first vertical rail, each of the hooks including an opening, and each opening is located on a common side of the rail barricade (Figure 1).

Doublet fails to disclose a rail barricade comprising a first foot pivotally attached to the rail barricade; and a second foot pivotally attached to the rail barricade.

Bilby et al. teaches a rail barricade comprising a first foot **24** pivotally attached to the rail barricade; and a second foot **26** pivotally attached to the rail barricade;

wherein the first foot and the second foot are each pivotal approximately 90° between a use position and a storage position, and the first foot and the second foot are substantially perpendicular to a top rail **14** and a bottom rail **16** when the first foot and the second foot are in the use position and the first foot and the second foot are substantially parallel to the top rail and the bottom rail when the first foot and the second foot are in the storage position;

wherein the first foot and the second foot each include a vertical stem **36** having a pair of opposing cutouts **44,46** wherein the vertical stem of the first foot is inserted into a first vertical member and the vertical stem of the second foot is inserted into a second vertical member; and

the rail barricade including an attachment member **28** inserted into the pair of opposing cutouts of the vertical stem of each of the first foot and the second foot to secure the first foot to the first vertical rail and to secure the second foot to the second vertical rail; the pivotal attachment of each foot to the frame providing for easy storage

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and transportation of the rail barricade, the pivotal attachment enabling rail barricades to be stacked (column 3 lines 38-47, Figure 1). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a rail barricade as disclosed by Doublet to have pivotal attachment of each foot to the frame as taught by Bilby et al. in order to provide for easy storage and transportation of the rail barricade.

As to claim 2, Doublet discloses a rail barricade wherein the first foot **8** is attached to the first vertical rail **4** (via rail **6**) and the second foot **9** is attached to the second vertical rail **3**, and the first vertical rail has a first rail length and the second vertical rail has a second rail length, and the first rail length is greater than the second rail length, and the first foot has a first foot height and the second foot has a second foot height, and the second foot height is greater than the first foot height (Figure 1).

As to claim 5, Bilby et al. teaches a rail barricade wherein the pair of opposing cutouts **44,46** are each substantially H-shaped (Figures 3 and 4).

Doublet in view of Bilby et al. fails to disclose a rail barricade wherein the pair of opposing cutouts are each substantially Z-shaped. The applicant is reminded that a change in the shape of a prior art device is a design consideration within the skill of the art. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a rail barricade as disclosed by Doublet in view of Bilby et al. to have cutouts having a Z-shape as such practice is a design consideration within the skill of the art.

As to claim 8, Doublet discloses a rail barricade wherein the first end and the second end of the bottom rail **6** each have an end curvature and the first vertical rail **4** and the second vertical rail **3** each have a rail curvature that is shaped to correspond to the end curvature (Figure 1).

As to claims 9 and 10, Doublet discloses a rail barricade wherein the second end of the bottom rail **6** includes a projection (end of rail **6**) and the second vertical rail **3** includes a notch (opening in rail **3**; inherently), and the projection of the second end of the bottom rail is received in the notch of the second vertical rail (Figure 1).

Doublet discloses a rail barricade wherein the bottom rail and the first vertical rail are formed as a unitary bent rail instead of the separate bottom and vertical rails, the first end of the bottom rail including a projection and the first vertical rail including a notch.

Bilby et al. teaches a rail barricade wherein both the first end and the second end of a bottom rail **16** each include a projection (ends of rail **16**) and both a first vertical rail **18** and a second vertical rail **20** each include a notch (opening in rail **18,10**; Figure 1). Inasmuch as the references disclose a unitary bent rail and separate bottom and vertical rails as art recognized equivalents, it would have been obvious to one of ordinary skill in the exercise art to substitute one for the other. In re Fout, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

As to claim 10, Doublet discloses a rail barricade wherein the bottom rail **6** is secured to the second vertical rail **3** by a weld bead (column 3 lines 66-68, Figure 1).

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As to claim 11, Doublet discloses a rail barricade wherein each of the plurality of vertical spokes are attached to the top rail and the bottom rail by a weld.

As to claim 13, Doublet discloses a rail barricade including a second rail barricade, and the two hooks **15,16** secure the second rail barricade to the rail barricade (Figure 2).

As to claim 14, Doublet discloses a rail barricade wherein the second rail barricade is pivoted approximately 30° relative to rail barricade to attach the second rail barricade to the rail barricade and to remove the second rail barricade from the rail barricade (Figure 3b).

As to claims 17 and 18, Doublet discloses a method of forming a rail barricade comprising the steps of:

- attaching a first foot **8** to a frame;

- attaching a second foot **9** to the frame;

- inserting a top end of each of a plurality of vertical spokes **7** into one of a plurality of top holes (inherently) of a top rail **5** of the frame;

- inserting a bottom end of each of the plurality of vertical spokes into one of a plurality of bottom holes (inherently) of a bottom rail **6** of the frame;

- securing a first end and a second end of the bottom rail to a first vertical rail **4** and a second vertical rail **3** of the frame, respectively: and

- securing two hooks **15,16** to the first vertical rail of the frame, each of the two hooks including an opening, and each opening is located on a common side (left side) of the rail barricade (Figures 1 and 2).

Doublet fails to disclose a method comprising the steps of pivotally attaching a first foot to a frame; and pivotally attaching a second foot to the frame.

Bilby et al. teach a method of forming a rail barricade comprising the steps of pivotally attaching a first foot **24** to a frame; and pivotally attaching a second foot **26** to the frame; wherein the first foot and the second foot are pivotal approximately 90° between a use position and a storage position; the pivotal attachment of each foot to the frame providing for easy storage and transportation of the rail barricade, the pivotal attachment enabling rail barricades to be stacked (column 3 lines 38-47, Figure 1). Accordingly it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a method as disclosed by Doublet to have pivotal attachment of each foot to the frame as taught by Bilby et al. in order to provide for easy storage and transportation of the rail barricade.

As to claim 19, Doublet discloses a method wherein the step of securing includes welding (column 3 lines 66-68).

As to claim 20, Doublet discloses a rail barricade wherein the frame is integrated into a single piece (Figure 1).

As to claim 21, Doublet discloses a rail barricade wherein a second rail barricade is receivable in the opening of each of the two hooks **15,16** (Figure 2).

As to claim 22, Doublet discloses a rail barricade wherein the second rail barricade is pivoted about a longitudinal axis of a vertical rail of the second rail barricade to attach the second rail barricade to the rail barricade, the vertical rail of the second rail barricade is inserted into the opening of each of the two hooks **15,16** of the

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rail barricade, and the second rail barricade is pivoted in a reverse direction to secure the second rail barricade to the rail barricade (Figure 3b).

As to claim 23, Doublet discloses a rail barricade wherein the second rail barricade is pivoted approximately 30° relative to the rail barricade (Figure 3b).

As to claim 24, Doublet discloses a rail barricade wherein each of the plurality of vertical spokes 7 has a substantially circular cross-section (Figure 1).

As to claim 26, Doublet discloses a rail barricade wherein the first foot 8 is substantially U-shaped (Figure 1).

Doublet fails to disclose a rail barricade wherein the second foot is substantially U-shaped. The applicant is reminded that a change in the shape of a prior art device is a design consideration within the skill of the art. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a rail barricade as disclosed by Doublet to have a second foot having a U-shape as such practice is a design consideration within the skill of the art.

As to claim 27, Doublet discloses a rail barricade wherein the first vertical rail 4 includes a first bottom and the second vertical rail 3 includes a second bottom and the first foot 8 is attached to the first bottom (via rail 6) of the first vertical rail and the second foot 9 is attached to the second bottom of the second vertical rail (Figure 1).

As to claim 28, Doublet discloses a rail barricade wherein the second rail barricade includes a vertical rail having a longitudinal axis, and the second rail barricade

is pivoted about the longitudinal axis of the vertical rail of the second rail barricade (Figure 3b).

As to claim 32, Doublet discloses a method including the step of attaching a second rail barricade to the rail barricade and the step of attaching includes pivoting the second rail barricade in a first direction about a longitudinal axis of a vertical rail of the second rail barricade, inserting the vertical rail of the second rail barricade in the opening of each of the two hooks **15,16** and pivoting the second rail barricade in an opposing direction about the longitudinal axis (Figure 3b).

As to claim 33, Doublet discloses a method where the second rail barricade is pivoted approximately 30° (Figure 3b).

7. Claims 25 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Doublet in view of Bilby et al. as applied to claims 24 and 17 above, and further in view of Lauzier.

As to claim 25, Doublet in view of Bilby et al. fails to disclose a rail barricade wherein each of the plurality of vertical spokes includes an end having a flat portion.

Lauzier teaches a rail barricade wherein each of a plurality of vertical spokes **3** includes an end having a flat portion **6**; the flat portion of each vertical spoke providing for a secure, non-rotable hold of the spoke within a corresponding rail (column 2 lines 61-65, Figure 1). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a rail barricade as disclosed by Doublet to have vertical spokes each having a flat portion as taught by Lauzier in order to provide for a secure, non-rotatable hold of the spoke within a corresponding rail.

As to claim 31, Doublet in view of Bilby et al. fails to disclose a method including the steps of preventing rotation of each of the plurality of vertical spokes relative to the top rail and the bottom rail, and each of the plurality of vertical spokes have a substantially circular cross-section and an end with a flat portion that engages a flat surface in one of the plurality of top holes and the plurality of bottom holes.

Lauzier teaches a method including the steps of preventing rotation of each of the plurality of vertical spokes 3 relative to a top rail 1 and the bottom rail 2, and each of the plurality of vertical spokes have a substantially circular cross-section and an end with a flat portion 6 that engages a flat surface 5 in one of the plurality of top holes and the plurality of bottom holes; the flat portion of each vertical spoke providing for a secure, non-rotatable hold of the spoke within a corresponding rail (column 2 lines 61-65, Figure 1). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a method as disclosed by Doublet to have vertical spokes each having a flat portion as taught by Lauzier in order to provide for a secure, non-rotatable hold of the spoke within a corresponding rail.

Allowable Subject Matter

8. Claim 6 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

9. The following is a statement of reasons for the indication of allowable subject matter:

As to claim 6, Doublet in view of Bilby et al. discloses the claimed rail barricade with the exception of including tubes each having a vertical slit and a hole, and one of the tubes is positioned between the vertical stem of the first foot and the first vertical rail and one of the tubes is position between the vertical stem of the second foot and the second vertical rail.

It would not have been obvious to one having ordinary skill in the art at the time the invention was made to modify a rail barricade as disclosed by Doublet in view of Bilby et al. to have the above mentioned elements as the prior art neither teaches nor suggest such modifications.

Response to Arguments

10. Applicant's arguments with respect to claims 1-19 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

The prior art made of record and not relied upon is considered pertinent to the applicant's disclosure. The following patents show the state of the art with respect to rail barricades:

Doublet (US 4,647,016) is cited for pertaining to barricades comprising a frame and hooks.

De Guise (US 6,053,480) is cited for pertaining to barricades comprising spokes having a circular cross-section and a flat portion.

11. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

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§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael P. Ferguson whose telephone number is (703)308-8591. The examiner can normally be reached on M-F (7:30-4:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on (703)308-2686. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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02/10/05

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